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No. 90-971

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1990

AVESTA AB AND AVESTA STAINLESS, INC.,

Petitioners,

v.

THE UNITED STATES, ALLEGHENY LUDLUM STEEL CORPORATION, ARMCO INC., JESSOP STEEL CORPORATION, J & L SPECIALTY PRODUCTS COMPANY, WASHINGTON STEEL CORPORATION, AND UNITED STEELWORKERS OF AMERICA, AFL/CIO-CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

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19 U.S.C. § 1675(b)(1) . . . . . *passim*

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The petition for certiorari asserts that the Commission's construction of Section 751(b)(1) is contrary to its plain meaning and legislative history, including the GATT Anti-dumping Code. Section 751(b)(1) was enacted to implement the GATT Code, and Congress and the Administration made this intent crystal clear. Pet.

12-13. The government's brief attempts to disguise this obvious conclusion in two respects. U.S. Br. in Opp. 9-10.

First, contrary to the government's suggestion, petitioners do not contend that Section 751(b)(1) is inconsistent with the Anti-dumping Code. U.S. Br. in Opp. 10. Rather, petitioners recognize that Congress expressly intended to implement the Code by enacting Section 751(b)(1) and that the Commission's decisions have acknowledged that Section 751(b)(1) was enacted to implement the GATT Anti-dumping Code. In fact, the Commission has recognized that the GATT Code is relevant to proper construction of Section 751(b)(1).[1] However, it is petitioners' position that the Commission has failed to apply Section 751(b)(1) in a manner consistent with the statute's text and legislative history. (Incidentally, respondents Allegheny Ludlum *et al.* incorrectly suggest that Congress enacted Section 751(b)(1) to merely codify the Commission's prior review practices. Allegheny Br. in Opp. 13-14. This is demonstrably wrong and the Commission itself has recognized that the legislative history of the Act refers to its prior practice "only by way of comment and without specifically approving it or indicating that the new law would be a codification of that practice." *Electric Golf Carts From Poland*, USITC Publ. 1069, Inv. No. AA1921-147A (June 1980) 12-13 (footnote omitted).)

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[1] The Commission expressly acknowledged that Section 751(b)(1) was "intended to implement" the GATT Anti-dumping Code and that "an examination of the relevant parts of these two agreements [including the prior Antidumping Agreement] helps to clarify the Commission's role." *Electric Golf Carts From Poland*, USITC Publ. 1069, Inv. No. AA1921-147A (June 1980) 12; *accord*, *Birch Three-Ply Door Skins From Japan*, USITC Publ. 1271, Inv. No. 751-TA-6 (July 1982) 3; *Television Receiving Sets From Japan*, USITC Publ. 1153, Inv. No. 751-TA-2 (June 1981) 6 and 28.

The government's second error is to claim that petitioners present a "new" issue not properly before the Court. U.S. Br. in Opp. 9-10. The issue in this case has always been the proper construction of Section 751(b)(1). In fact, petitioners expressly relied upon the Anti-dumping Code in both courts below in support of its construction of Section 751(b)(1). Br. for Avesta AB 24-25 (Fed. Cir. No. 90-1120); Br. in Spt. of Avesta AB's Mot. for Judg. Upon Agency Record 19-21 (CIT No. 87-07-00799).

Apart from the government's erroneous assertions, the domestic industry makes grossly misleading and incomplete arguments. First, the industry asserts that "the last administrative review by the ... Department of Commerce ... revealed continued dumping...," citing 49 Fed. Reg. 39885-39886 (Oct. 11, 1984). Allegheny Br. in Opp. 16-17. The most recent review of the Swedish steel dumping margins covered a period from 1973 to May 1982, almost a decade ago. 49 Fed. Reg. 39885-39886 (1984). Even then, the dumping margin was zero for one review period and only 4.46% or 6.21% for others. *Ibid.*

Second, the same respondents assert outrageously that the Department of Commerce "determined not to revoke this antidumping finding" as recently as September 6, 1990. Allegheny Br. in Opp. 17. This statement is grossly misleading. Under its regulations, 19 C.F.R. § 353.25(d)(4), the Department of Commerce publishes a notice announcing that it *intends to revoke* any antidumping finding in which there has been no request for a review of the dumping margins in four consecutive years. This procedure was followed here. 55 Fed. Reg. 22365 (June 1, 1990). All that is required to prevent revocation is for a single interested party to file a *pro forma* objection, without advancing any reasons. In this case, a single, simple "objection" was filed by the industry respondents. Solely on this basis, the Department of Commerce could not revoke

the dumping finding. This hardly rises to the dignity of a "determination," as respondents Allegheny Ludlum *et al.* assert. It is plainly apparent from its published notice, 55 Fed. Reg. 36681 (Sept. 6, 1991), that the Department of Commerce made no substantive determination that sales at less than fair value have in fact continued (or resumed for the companies which made no importations) since the last actual review period, which ended in May 1982.

Third, the domestic industry asserts that, in conducting a review under Section 751(b)(1), the Commission must assume that dumping will continue if an antidumping order is revoked or cancelled, invoking *American Permac, Inc. v. United States*, 831 F.2d 269, 274 (Fed. Cir. 1987), *cert. dism'd*, 485 U.S. 901 (1988). Allegheny Br. in Opp. 16. In *American Permac* the Commission had in fact *granted* review. Thus, in contrast to the situation in this case, the Commission made its decision on the basis of the facts presented on a full administrative record. That is precisely what did *not* occur in this case because the Commission refused to initiate a review under Section 751(b)(1).[2]

Finally, mention must be made of respondent United States' allusion to a Commission regulation which in essence requires a

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[2] The Commission's confusion of the threshold showing sufficient to *initiate* a review with that required to obtain revocation is apparent from comparing its denial of the petitioners' request *to initiate* a review with its *third* decision in *Salmon Gill Fish Netting of Manmade Fibers from Japan*, USITC Publ. 1921, Inv. No. 751-TA-11 (December 1986), which revoked the dumping order. The private respondents fail to cite this decision. Allegheny Br. in Opp. 14. The Commission's decision denying petitioners' *request* for review is indistinguishable in terms of analysis and burden from its last decision *on the merits* in *Salmon Gill Fish Netting, supra*, which should not be the case under Section 751(b)(1); that decision was made after a hearing and full investigation.

showing that "revocation of the antidumping order would not lead to a recurrence of material injury." Br. for U.S. in Opp. 9. It also asserts that the Commission may not consider changed circumstances "that are the natural and direct consequences of imposition of the challenged antidumping order ...," citing *A. Hirsh, Inc. v. United States*, 737 F. Supp. 1186, 1188 (CIT 1988). *Ibid.* But these points lead to a "Catch-22" rationalization intended to justify the Commission's practice of preventing meaningful review of outstanding dumping orders.

The burden of proving that revocation of an antidumping order would not cause a recurrence of material injury must come during an investigation. It must not be a prerequisite for commencing the investigation. Here, petitioners obviously made a sufficient showing of "changed circumstances" to require the Commission to initiate a review and give petitioners an opportunity to show *on the record* that no domestic industry would be injured if the order were modified or revoked.

The Commission should have conducted an investigation to determine whether the almost 20-year-old order in issue remains necessary. Congress' intent in enacting Section 751(b)(1) was to permit the restoration of trade and review by this Court is necessary to prevent antidumping orders from becoming permanent barriers to trade.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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